79-436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STANLEY HARAPAT,

Petitioner

vs.

PATRICIA R. HARRIS,
Secretary of Health, Education
and Welfare

Respondent.

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
For The Eighth Circuit

William A. Smoley
RINKE, NOONAN, GROTE &
SMOLEY, LTD.
Counsel for Petitioner
100 South Second Avenue
Sauk Rapids, Minnesota 56379

339-9518 — Bachman Printing, 609 2nd Ave. So., Mpls., MN 55402 — 339-9518

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statutes and Regulations Involved. 2

Statement 2

Reasons For Granting This Writ 4

Conclusion 5

APPENDIX A

Opinion of the United States Court of Appeals, May 14, 1979 . . . . . A-1

Judgment of the United States Court of Appeals, May 14, 1979 . . . . . A-7

Order of the District Court for the District of Minnesota, June 14, 1979 . . . . . A-8

Judgment of the District Court for the District of Minnesota, June 14, 1979 . . . . . A-9

Order of the District Court for the District of Minnesota, August 29, 1978 . . . . . A-10

Judgment of the District Court for the District of Minnesota, August 29, 1978 . . . . . A-11

Recommendation of the United States Magistrate, August 17, 1978 . . . . . A-12

Decision of Appeals Council, March 24, 1978. . . . . A-18

Recommended Decision of Administrative Law Judge, December 23, 1977 ..... A-21

Order of the District Court for the District of Minnesota, June 20, 1977 ..... A-43

Recommendation of the United States Magistrate, June 20, 1977 ..... A-44

Statute:

42 U. S. C. § 405(g) A-54

Regulations:

20 C. F. R. § 404.957 ..... A-56

20 C. F. R. § 404.958 ..... A-58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STANLEY HARAPAT,

Petitioner

vs.

PATRICIA R. HARRIS,
Secretary of Health, Education
and Welfare

Respondent.

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
For The Eighth Circuit

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Stanley Harapat, the Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on May 14, 1979.

Opinions Below

The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 598 F.2d 474 (1979) and is printed in Appendix A hereto, infra, page A-1. The Judgement of the Eighth Circuit Court of Appeals is printed in Appendix A hereto, infra, page A-8. The United States District Court for the District Court of Minnesota did not issue an opinion. The

Orders of the District Court are printed in Appendix A hereto, infra, pages (-8, A-10, and A-43. The Entry of Judgments of the United States District Court for the District of Minnesota are printed in Appendix A hereto, infra, pages A-9 and A-11.

Jurisdiction

The Judgment of the Eighth Circuit Court of Appeals (Appendix, infra, page A-8) was entered on May 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals err in ruling that District Court jurisdiction was barred by administrative *res judicata*?

Statutes And Regulations Involved

Statute:

42 U.S.C. 405(g), page 515

Regulations:

20 C.F.R. 404.957, page 200

20 C.F.R. 404.958, page 201

Statement

This action was brought in the United States District Court for the District of Minnesota. Respondent-Secretary of Health, Education & Welfare sought review of the order of the district court, Edward J. Devitt, Chief Judge, dated August 29, 1978, awarding Social Security disability benefits to Petitioner Stanley Harapat. Said appeal was taken pursuant to 28 U.S.C. § 1291.

Petitioner is now 58 years of age with limited mental capacity (an IQ of 71), with a seventh grade education. He has no specialized or vocational skills. His work has always been that of a laborer. His occupational history reveals that he has worked as a painter, kitchen helper, assembler of airconditioners, operator of a power saw and a farmer. Since World War II

he has had no steady employment, earning only $7,500.00 in his entire lifetime. Since the early 1950's, he has not worked at all. The period of time that is of concern is pre-1953. All the medical facts that existed as of that date are uncontradicted. They show Petitioner to be totally disabled because of rheumatoid arthritis.

Petitioner filed his first application for disability benefits on June 19, 1962 (Tr. 194-197). Said claim was denied initially (Tr. 188-190), on reconsideration (Tr. 192-193), and finally, after a hearing, by an administrative law judge on September 30, 1963 (Tr. 60-67). Petitioner was not represented by counsel at any stage of the proceedings and did not request review with the Appeals Council.

Petitioner filed a second application on August 16, 1965 (Tr. 269-272). Said application was denied (Tr. 273-274) and no further action was taken. Petitioner was not represented by counsel.

Petitioner filed his third application on October 31, 1967 (Tr. 275-278). Petitioner's application was denied (Tr. 279-280). No further action was taken. Petitioner was not represented by counsel.

Petitioner filed his fourth application on July 22, 1968 (Tr. 281-284). Said application was denied initially and upon reconsideration (Tr. 285-289), no further action was taken. Petitioner was not represented by counsel.

Petitioner filed his fifth application for disability benefits on April 1, 1970 (Tr. 290-293). Said application was denied (Tr. 294-295). No further action was taken. Petitioner was not represented by counsel.

Petitioner made his sixth application for disability benefits on September 22, 1972 (Tr. 296-299). Said application was denied initially (Tr. 300-304). No further action was taken. Petitioner was not represented by counsel.

Petitioner's last application for disability benefits was filed

on May 14, 1974 (Tr. 302-305). Said application was denied both initially and on reconsideration on the grounds of *res judicata* (Tr. 306-310). Petitioner's request for a hearing was also denied on the basis of *res judicata* (Tr. 50-53). Petitioner then requested review with the Appeals Council and submitted four additional medical reports (Tr. 48-49). The Appeals Council affirmed the dismissal of Petitioner's request for a hearing (Tr. 47). Petitioner was now represented by counsel.

Petitioner filed a civil action in the United States District Court for the District of Minnesota on June 8, 1976, pursuant to Section 205(g) of the Social Security Act as amended (41 U. S. C. § 405(g)). The District Court ordered the case remanded to the Secretary for a hearing on the merits. No appeal to said order was taken by the Secretary. After the hearing on the merits, the administrative law judge issued a recommended denial decision on December 23, 1977 (Tr. 24-42). The Appeals Council adopted the findings and conclusions of the administrative law judge's recommended decision and was of the opinion that the Petitioner was not under a "disability" on or before March 31, 1953 (said date being the last day Petitioner met the earnings requirement of the Social Security Act.)

On August 29, 1978, the District Court, Edward J. Devitt, Chief Judge, ordered that Judgment be entered in favor of the Petitioner.

Reasons For Granting This Writ

This is an important question of federal law which has not been, but should be, settled by the Supreme Court. The Court of Appeals decided a federal question in a way in conflict with applicable decisions of the Supreme Court. The original appeal to the Court of Appeals was from an order of the District Court overruling findings of the administrative law judge and the Appeals Court - these were findings on the merits, not on *res judicata*. Moreover, the defense of administrative *res judicata* has no application where it is clear that a mistake has been

made or where it is clear that a decision is incorrect. The question is whether an injustice has been done to Petitioner. Mr. Harapat is a semi-literate man, with a seventh grade education and an IQ of 71 with severe physical and mental problems who was without representation of counsel at the time the Secretary claims *res judicata* took effect. The claim of *res judicata* should not prevent Mr. Harapat from having his day in Court.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

William A. Smoley
RINKE, NOONAN, GROTE
& SMOLEY, LTD.
Counsel for Petitioner
100 South Second Avenue
Sauk Rapids, Minnesota 56379

APPENDIX

No. 78-1793
Submitted March 15, 1979.
Decided May 14, 1979

Stanley HARAPAT,

Appellee,

v.

Joseph A. CALIFANO, Jr.,
Secretary Health, Education
and Welfare,

Appellant.

Before GIBSON, Chief Judge, and ROSS and McMILLIAN, Circuit Judges.

ROSS, Circuit Judge.

In this case we consider an appeal by the government in the tortuous attempt by Stanley Harapat, a social security claimant, to receive social security benefits.

Mr. Harapat first applied for social security benefits on June 29, 1962. This claim was denied initially, on reconsideration and, eventually, after a hearing. The decision from that hearing, which was held before an administrative law judge, was September 30, 1963. No appeal was taken to the Appeals Council.

Thereafter, Mr. Harapat filed a second application in August 1965, a third in October 1967, and a fourth in July 1968, a fifth in April 1970, a sixth in September 1972, and a seventh, and final application, in May 1974. All of the claimant's applications were denied.

Mr. Harapat last met the special earnings requirement of the social security statute on March 31, 1953, and must, therefore, prove his entitlement to benefits on or before that date. *John-*

son v. Richardson, 486 F.2d 1023, 1024 (8th Cir. 1973). Mr. Harapat alleges that he suffers from severe and debilitating arthritis as well as other impairments.

Following his most recent rejection, Mr. Harapat filed suit in the United States District Court in Minnesota on June 8, 1976. In the complaint Mr. Harapat's counsel alleged that the "final decision of the [Social Security] Administration is erroneous and without any substantial evidence in support thereof* * *." In answer to Harapat's complaint the United States Attorney's office filed a motion to dismiss, alleging that the plaintiff had failed to state a claim and that the court lacked subject matter jurisdiction to review dismissals based on *res judicata.*

The district court rejected the government's position and adopted the recommendation of Magistrate McPartlin that *res judicata* should *not* have been applied in this case. The district court then ordered a new hearing before an administrative law judge.

The rehearing was held in September 1977, but once again Mr. Harapat did not prevail. He appealed that adverse decision to the district court, and the district court, on the recommendation of Magistrate McPartlin, reversed the administrative law judge, conlcuding that the denial of benefits was not supported by substantial evidence on the record as a whole. From this judgment of the district court entered in favor of Harapat, the government has appealed to this court.

The government's primary contention is that the district court was without jurisdiction to review the case, and secondly, assuming jurisdiction existed, that the decision of the ALJ was supported by substantial evidence. We agree that the district court was without jurisdiction and reverse.

Judicial review of decisions of the Secretary is provided for in 42 U. S. C. § 405(g), (h) in pertinent part as follows:

Judicial review

(g) Any individual, *after any final decision of the Secre-*

tary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. * * *

Finality of Secretary's decision

(h) The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. * * *

(Emphasis added.)

The 1963 decision in Mr. Harapat's case, the decision which followed the first evidentiary hearing, became final when no appeal was taken from there to the Appeals Council and to the courts. Numerous reapplications by Mr. Harapat followed over the years, however.

In an order dated February 9, 1976, the Secretary denied a request by Mr. Harapat for a hearing and the denial was affirmed by the Appeals Council on April 12, 1976.[1]

In an order accompanying the denial of this hearing request, the administrative law judge concluded that Mr. Harapat's seventh application had been properly denied on the basis of *res judicata* pursuant to 20 C. F. R. § 404.937, and also that there was no basis for reopening the case under the regulations.

Dismissal on *res judicata* grounds, as well as *reopening* a prior decision is provided for in the regulations. Section 404.937 permits a presiding officer to dismiss a hearing request on grounds of *res judicata* where there has been a previous determination by the Secretary with respect to the rights of the same party on the same facts, relevant to the same issues, where

[1] The hearing request had *followed* an adverse "Reconsideration Determination" on September 9, 1975, which had in turn followed the denial of Mr. Harapat's seventh, and final, application for benefits in December 1974.

that decision has become final either by judicial affirmance, or without judicial consideration, upon the claimant's failure to timely request review.[2]

Section 404.957 of the regulations also permits, however, administrative reconsideration of a prior claim. "This is in the form of regulations for reopening of the agency determination within specified time limits after the date of initial determination: 12 months as a matter of right and four years 'upon a finding of good cause,' which exists if new material evidence is provided or specific error are discovered. 20 CFR § § 404.957 (a), (b), 404.958 (1976). Moreover, the regulations permit reopening '[a]t any time' for the purpose of correcting clerical errors or errors on the face of relevant evidence. § 404.957(c) (8)." *Califano v. Sanders*, 430 U. S. 99, 102, 97 S.Ct. 980, 982, 51 L.Ed.2d 192 (1977).

Contrary to the conclusions of the magistrate and district court, and contrary to the arguments of the claimant on appeal, we believe it was error for the district court to have assumed jurisdiction in this case. Though we reluctantly reach this conclusion, *Sheehan v. Secretary of Health, Education & Welfare*, 593 F2d 323 (8th Cir. 1979), that conclusion is mandated by our prior cases.

In *Califano v. Sanders, supra*, 430 U. S. 99, 97 S.Ct. 980, 51 L.Ed2d 192 the Supreme Court held that the courts are without jurisdiction to review a decision of the Secretary not to *reopen* a claim of benefits. Citing statutory section 42 U. S. C. § 405(g), the Court states: "This provision clearly limits judicial review to a particular type agency action, a 'final decision

[2] § 404.937 Dismissal for cause.

The presiding office may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:

(a) *Res judicata*. Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision (see § § 404.911, 404.918, 404.946, and 404.951).

of the Secretary made after a hearing.' But a petition to reopen a prior final decision may be denied without a hearing as provided in § 205.(b), 42 U. S. C. §405(b) (1970 ed., Supp. V); see *Cappadora v. Celebrezze*, 356 F.2d 1, 4 (CA2 1966); *Ortego v. Weinberger*, 516 F.2d 1005, 1007 (CA5 1075)." *Califano v. Sanders, supra*, 430 U. S. at 108 97 S.Ct. at 985.

In the *Sanders* opinion, the Supreme Court cited with approval *Neighbors v. Secretary of Health, Education & Welfare*, 511 F.2d 80 (10th Cir. 1974), a decision of the Tenth Circuit Court of Appeals denying that it had jurisdiction to review the agency's findings of *res judicata* under regulation § 404.937.

The issue raised in the present appeal, that is whether the district court lacked jurisdiction to entertain a suit under the Act challenging the dismissal of an application for benefits on the ground that such application had been denied previously, was before us in *Hobby v. Hodges*, 215 F.2d 754 (10th Cir. 1954). In *Hobby* we held that, where an applicant under the Act has filed a second application raising a claim for relief previously passed upon in an earlier application and where subsequent application was dismissed without hearing on the ground of res judicata, there is no "final decision of the Secretary made after hearing" and hence the court lacks jurisdiction to entertain a suit challenging such earlier decision. This result has been reached in other cases, and we think from the record such result is manifestly required here: It is clear that under the Act and regulations promulgated thereunder, appellant had sixty (60) days from the October 2, 1970 decision of the Secretary to seek judicial review of such decision. Appellant failed to do so, and the filing of a second and substantially identical application for disability benefits will not allow him to circumvent this requirement of the Act.

Id. at 81 (footnotes omitted). *See also Janka v. Secretary of Health, Education and Welfare*, 589 F.2d 365 (8th Cir. 1978); *Sheehan v. Secretary of Health, Education & Welfare, supra*,

593 F.2d 323. (No jurisdiction to review agency's denial of extension of time to appeal for lack of "good cause.")

These precedents are controlling and do not permit the courts to order new evidentiary hearings when a claim is in this posture. We share the district court's empathy for claims like the present one, but the Supreme Court has said: "Congress' determination so to limit judicial review to the original decision denying benefits is a policy choice obviously designed to forestall repetitive or belated litigation of stale eligibility claims. Our duty, of course, is to respect that choice." *Califano v. Sanders, supra*, 430 U. S. at 108, 97 S.Ct. 986.[3]

We reject as well the claimants assertion that this court may not properly address the jurisdictional issue because the government waited to appeal that issue to this court until the completion of the new evidentiary hearing on the merits which was ordered by the district court.[4] It is clear that the issue of subject matter jurisdiction may appropriately be raised at any time. *Baker Oil Tools, Inc. v. Delta Steamship Lines, Inc.*, 562 F2d 938, 940 n. 2 (5th Cir. 1977).

Because we conclude that the district court lacked subject matter jurisdiction, we need not address that court's finding that the administrative law judge's determinations were unsupported by substantial evidence, or its decision to award benefits to Mr. Harapat.

The judgment is reversed and remanded with directions to dismiss appellee's complaint.

[3] Claimants are free, of course, to challenge decisions of the Secretary on constitutional grounds: '[W]hen constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' stop of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence." *Califano v. Sanders*, 430 U. S. 99, 109, 97 S. Ct. 980, 986, 51 L. Ed. 2d (1977).

[4] Although it does not affect the outcome of the case, it should be noted that the recommendation of the magistrate to remand the case to the Secretary for a hearing was approved and an order entered the same date the report was filed. The ten-day period for filing objections to the report, as required by 28 U. S. C. § 636(b) (1), was not given.

as required by 28 U. S. C. § 636(b) (1), was not given.

JUDGMENT

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 78-1793
September Term 1978

Stanley Harapat,

Appellee,

vs.

Joseph A. Califano, Jr., Secretary,
Health, Education and Welfare,

Appellant.

APPEAL FROM the United States District Court for the District of Minnesota.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the District of Minnesota and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said Distict Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court with directions to dismiss appellee's complaint in accordance with the opinion of this Court.

May 14, 1979

/s/ Robert C. Tucker
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

STANLEY HARAPAT
Plaintiff,

vs.

ORDER
Civil No. 6-76-199

CASPER WEINBERGER,
Secretary of Health,
Education and Welfare
Defendant.

In accordance with the ruling by the Eighth Circuit Court of Appeals in this action docket June 11, 1979,

IT IS ORDERED that Plaintiff's complaint be dismissed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 14, 1979

/s/ Edward J. Devitt, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

STANLEY HARAPAT,
Plaintiff,
v. Civil No. 6-76-199
CASPER WEINBERGER,
Secretary of Health,
Education and Welfare,
Defendant.

You are hereby notifited that in the above-entitled case on the 14th day of June, 1979, filed and entered ORDER (Devitt-J 6-14-79) that Plaintiff's complaint be dismissed. Let Judgment be entered accordingly.

JUDGMENT FILED AND ENTERED
Harry A. Sieben, Clerk
/s/ Bernadine L. Brown
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Stanley Harapat, Civil 6-76-199
Plaintiff,
vs. ORDER
Casper Weinberger, Secretary
of Health, Education & Welfare,
Defendant.

I accept the recommendation of the United States Magistrate and direct that judgment be entered in favor of the plaintiff.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: August 19, 1978.

/s/ Edward J. Devitt, Chief Judge
United States District Court

Filed August 29, 1978
Harry A. Sieben, Clerk
/s/ Bernadine L. Brown
Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Stanley Harapat,
Plaintiff,
v.
Casper Weinberger, Secretary of
Health, Education & Welfare,
Defendant.

Civil 6-76-199

You are hereby notified that in the above-entitled case on the 29th day of August, 1978, filed and entered Order (Devitt-J 8-29-78) accepting the recommendation of the U. S. Magistrate and directing that judgment be entered in favor of the plaintff. Let Judgment be entered accordingly.

JUDGMENT entered

HARRY A. SIEBEN, Clerk
By /s/ Bernadine L. Brown
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Stanley Harapat,
Plaintiff,
vs.
Casper Weinberger, Secretary of
Health, Education & Welfare,
Defendant.

Civil 6-76-199

RECOMMENDATION

RINKE, NOONAN, GROTE & SMOLEY by WILLIAM A. SMOLEY, 100 South Second Avenue, Sauk Rapids, Minnesota, attorneys for plaintiff.

ANDREW W. DANIELSON, United States Attorney, and DOUGLAS A. KELLEY, Assistant United States Attorney, Minneapolis, Minnesota, attorneys for defendant.

This is an appeal by the applicant for social security disability insurance benefits which this court reviewed in June of 1977 and returned for a new hearing in that the transcript furnished to the court was obviously incomplete and illegible. In September of 1977, the Administrative Law Judge presided at a rehearing in St. Cloud, Minnesota, which was decided adversely to the petitioner, and again appealed to the District Court. The Secretary has furnished the court with a 452 page record together with an 85 page transcript of the September 1977 hearing.

The petitioner is 58 years of age and has a seventh grade education. His work has always been that of a laborer. Since his discharge from World War II, his only work has been odd jobs here and there, but none of his employment has been steady.

At the previous hearing in 1976, from which the petitioner

appealed, there were a few medical reports presented according to the record, but the reports were so illegible that they were meaningless. At the hearing in September of 1977, medical reports of petitioner's attending physician, Dr. Robert T. Peterson, were presented and entered as exhibits. There are reports from Dr. Petersen dating back to 1951 indicating previous treatment and subsequent reports of Dr. Petersen to the date of the hearing. In all of these reports, he has stated that in his opinion, as the attending physician and from his many examinations, Mr. Harapat is totally disabled.

A vocational expert was called by the Administrative Law Judge to attend the hearing and listen to the testimony. He was also requested to, prior to the hearing, read the medical reports that had been submitted. The Administrative Law Judge asked the vocational expert a number of hypothetical questions. However, on other hypothetical questions, he intentionally omitted testimony of the petitioner but gave no reason for so doing. In part, the vocational expert's testimony was as follows (tr. pages 174, 175 & 1976):

Q "–as testifed here. Now, would you assume for the purposes of this question that Mr. Harapat's testimony, as given here today, and also the testimony, as given by Mrs. Harapat, that he's had pain during this period; the pain was unrelenting; it prevented him from working; he stated at that time physically he was not able to mow lawn; he – climbing stairs, he had to rest going up stairs; he was unable to work in the garden at that time. He stated that back during the pertinent period he was able he could sit possibly an hour. He reads and writes very infrequently. And he stated he can't lift.

"Assume for the purposes of this question that the claimant's testimony is true. Do you have an opinion as to whether or not this claimant, Mr. Harapat, during that

pertinent period possessed any residual transferable skills based on that particular question?"

A. "Did you mean based upon the entire testimony or the–"

Q. "No, just based on what I gave you here."

A. "Yes."

Q. "In that question."

A. "The only possible thing would be if the headaches were that severe. But, of course, I believe that he–

Q. "I didn't mention headaches, but I mentioned – I meant to include it."

A. "Oh."

Q. "So, thank you."

A. "Okay. But he did mention that he has worked with that type of headaches before. So, providing that they weren't any worse, I couldn't quite be sure from his testimony, there is nothing in that outline that would preclude his doing sedentary type work."

A. "I see. And you understand now – just to repeat this now – he can walk a block, has to rest, can sit possibly an hour. He can't mow lawn, can't climb stairs. The pain is unrelenting and he's had to stop all work that he did, and he has headaches, low back pain, such that it required medication, as testified here.

"Now, based on that question are there any jobs within the economy you feel this man could do?"

A. "Well, if that istting were literally that he could not sit–

Q. "Just take it all literally."

A. "Okay. Then he could not do any jobs at all."

Q. "And that would–"

A. "He would be precluded from doing any type of work."

A. "All right. And that's based on his testimony here. And you are assuming his testimony is absolutely correct."

The Administrative Law Judge concluded that the claimant was not entitled to receive disability insurance benefits because claimant's credibility was clearly lacking, and as well, his wife's credibility was clearly lacking in their testimony pertaining to his daily activities and impairments. The Administrative Law Judge apparently discredited the testimony regarding pain and disability because the doctor and the witnesses were unable to present objective medical evidence indicating that the claimant suffered such impairment as to be disabled from working.

The fundamental issue before us is whether there exists substantial evidence on the record as a whole to support the finding that Mr. Harapat can engage in substantial gainful activity. More specifically, on the present record the issue is whether the Administrative Law Judge properly discounted the claimant's evidence of disabling pain in reaching his decision.

Although evidence of pain suffered by a claimant may be of necessity subjective in nature, and therefore difficult to evaluate, the administrative factfinder must give serious consideration to such evidence even though it is not fully corroborated by objective examinations and tests performed on the claimant. See *Thorne v. Weinberger*, 530 F. 2d 580, 583 (4th Cir. 1976); *Baerga v. Richardson*, 500 F. 2d 309, 312 (3d Cir. 1974), *cert. denied*, 420 U. S. 931 (1975). While the claimant has the burden of proving that the disability asserted results from a medically determinable physical or mental impairment, direct medical evidence of the cause and effect relationship between a physical impairment and the claimant's subjective pain need not

be produced. *Klug v. Weinberger*, 514 F. 2d 423, 427 (8th Cir. 1975). There is no question that pain can cause disability within the meaning of the Social Security Act. *Yawitz v. Weinberger*, 498 F. 2d 956, 960-61 (8th Cir. 1974); *Murphy v. Gardner*, 379 F. 2d 1, 7 n. 8 (8th Cir. 1967); *Northcutt v. Califano*, slip opinion 77-1977 filed July 20, 1978.

Once proper medical evidence, buttressed by subjective evidence from claimant has shown a sufficiently severe impairment, it must be determined if such impairment, plus claimant's educational and work status, preclude any substantial, gainful activity. *Blankenship v. Ribicoff*, 206 F. Supp. 165 (S. D. W. Va. 1962). In cases of this kind, where the claimant alleges inability to engage in substantial gainful activity, and his personal physician, the man in whose charge claimant has entrusted his health, claims likewise, if examining physicians are to dispute this contention, they must give the medical basis for their opinions. It is not sufficient to say that a man suffers some form of physical impairment yet can do "light work". It must be shown medically that he can perform the physical activities certain jobs require without serious aggravation to present physical impairment or to general health. Otherwise, the Hearing Examiner's findings would amount to pure speculation. *Clemochefsky v. Celebrezze*, 222 F. Supp. 73, 78 (D. C. Pa. 1963); *Floyd v. Finch*, 441 F. 2d 73, 83 (6th Cir. 1971). See *Massey v. Celebrezze*, 345 F. 2d 146, 157 (6th Cir. 1965).

The only medical evidence of record of Mr. Harapat's ability to do work is favorable to him; his own doctor stated that he was totally and completely disabled. An Administrative Law Judge may not draw upon his own inferences from medical reports. *Landess v. Weinberger*, 490 F. 2d 1187, 1189 (8th Cir. 1974); *Willem v. Richardson*, 490 F. 2d 1247, 1248-49 n. 3 (8th Cir. 1974). Nor is a vocational expert qualified to interpret diagnosis or to pass on the truth of subjective complaints. *Hamlet v. Celebrezze*, 238 F. Supp. 676 681 (E. D. S. C. 1965;

Lund v. Weinberger, 520 F. 2d 782 (8th Cir. 1975).

Since there is no factual basis in the record upon which the Administrative Law Judge could reject testimony, *Johnson v. Richardson*, 486 F. 2d 1023 (8th Cir. 1973), his testimony, which may serve as the basis of a disability award, *Timmerman v. Weinberger*, 510 F. 2d 239, 443 (8th Cir. 1975); *Yawitz v. Weinberger, supra*; annot. 23 A. L. R. 3d 1034 (1969); *Lund v. Weinberger, supra*, stands unrebutted. None of the medical reports are inconsistent.

I believe the rejection of the Administrative Law Judge of the testimony of Mr. Harapat and his wife is arbitrary and contrary to substantial evidence in the record. While credibility determinations are for the Secretary, there should be found in the record some basis for disbelieving such critical testimony. I find none. *Lund v. Weinberger, supra; Richardson v. Perales*, 402 U. S. 389, 401 (1971).

The Secretary's denial of Mr. Harapat's claim is not supported by substantial evidence in the record as a whole. I, therefore, recommend reversal of the judgment of the Administrative Law Judge and direct that judgment be entered in favor of the plaintiff herein.

DATED: August 17, 1978.

/s/ GEORGE G. McPARTLIN
United States Magistrate

All objections must be filed with the Clerk of Court, St. Paul, Minnesota, within 10 days of the filing of this Recommendation.

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNSIL

In the case of	Claim for
Stanley Harapat	Period of Disability and
	Disability Insurance Benefits
	720-18-0909

By order dated June 20, 1977, the United States District Court for the District of Minnesota remanded this case (Civil Action No. 6-76-199) to the Secretary of Health, Education, and Welfare. Thereafter, the Appeals Council remanded the case to an administrative law judge and a supplemental hearing was held on September 27, 1977.

On December 23, 1977, a recommended hearing decision was issued to which exceptions have been received.

Counsel contends that the medical reports submitted by the claimant's treating physician, Robert Peterson, M.D., when considered with the other evidence of record, establishes that the claimant was disabled prior to March 31, 1953, when special insured status requirements were last met. He contends that Dr. Peterson's conclusion that the claimant by his impairments, including arthritis, should have more weight that that of J. S. Abbott, M. D., who examined the claimant on only one occasion in 1952 and found no joint disturbance.

The decision of the administrative law judge shows that he considered the reports of both Dr. Peterson and Dr. Abbott and the other evidence of record in reaching the conclusion that the claimant was not disabled prior to March 31, 1953. The Council is persuaded that the evidence of record supports that conclusion.

Counsel states that the vocational expert testified that the claimant may be able to perform a sedentary type job but that he felt the claimant could not perform any work in the economy. He further notes that the possibility of obtaining employment must be reasonable, not merely conceivable.

A review of the transcript of the hearing reveals that the vocational expert's statement that the claimant would be precluded from doing any type of work was based on the testimony of the claimant and his wife about the limitations imposed by his impairments. When the vocational expert was asked other questions by the administrative law judge, he testified that the claimant would be able to perform sedentary work such as cementer or bench worker in the optical goods industry or wire worker in the electronics industry. The statements of the vocational expert were based on different assumptions and therefore do not conflict.

Counsel notes the testimony of the claimant and his wife about the claimant's headaches and pain. He mentions that the administrative law judge made several comments regarding their testimony and states that the administrative law judge is required to accept the testimony as a part of the claimant's evidence.

It is the duty of the administrative law judge to evaluate and weigh the credibility of the witnesses. The administrative law judge evaluated the testimony in this case and found that the claimant's credibility was lacking with respect to his testimony about his daily activities and impairments and his wife's credibility was lacking with respect to her testimony about the claimant's impairments.

The Council has also received a letter from the claimant's daughter, Ms. Kathy Harapat, in which she notes that the claimant is a disabled veteran and that Dr. Peterson stated as far back as 1949 that the claimant was totally disabled. She also comments on his impairments and daily activities.

The Apeals Council has considered all the evidence in light of the comments from counsel and Ms. Harapat and is of the opinion that the record supports the conclusions in the recommended decision issued on December 23, 1977. It is the decision of the Appeals Council that the claimant is not entitled to a period of disability or to disability insurance benefits under the provisions of sections 216(i) and 223, respectively, of the Social Security Act, as amended.

APPEALS COUNCIL
/s/ Joseph E. Doneghy, Member
/s/ Marshall C. Gardner, Member

Date: March 24, 1978

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

RECOMMENDED DECISION UPON
ORDER OF THE APPEALS COUNCIL

In the case of	Claim for
Stanley Harapat	Period of Disability and
	Disability Insurance Benefits
	72-18-0909

This case is before the undersigned Administrative Law Judge pursuant to a remand Order issued by the Honorable Edward J. Devitt on June 20, 1977, pursuant to a recommendation by United States Magistrate George C. McPartlin. Judge Devitt stated in his Order that the case was to be returned immediately to the Secretary for a hearing on the merits.

After due notice a hearing was held on September 27, 1977, in St. Cloud, Minnesota. Howard S. Feldman, Ed.D., vocational expert, Dorothy Harapat, claimant's wife, and the claimant were present and participated in the hearing. Mr. Harapat was represented by Orrin V. Rinke, attorney at law.

PROCEDURAL HISTORY

Stanley Harapat, the claimant, initially filed an application for disability insurance benefits on June 29, 1962, alleging inability to work since July or August 1950 because of a nervous condition, back condition and rheumatoid arthritis. He was denied benefits initially and upon reconsideration. Thereupon he requested a hearing before an Administrative Law Judge. Although advised of his right to counsel claimant was not represented at the hearing. On September 20, 1963, Hearing Examiner, Thomas E. Wiley, issued a decision finding that

the claimant was not entitled to a period of disability or to an award of disability insurance benefits. The claimant did not seek Appeals Council review of the Hearing Examiner's decision.

Mr. Harapat then filed his second, third and fourth applications for disability insurance benefits on August 16, 1965, October 31, 1967, and July 22, 1968, respectively, alleging that he first became unable to work because of his impairments in March 1945, He filed a fifth application for disability insurance benefits on April 1, 1970, alleging an onset date of spring 1952. On September 22, 1972, he filed a sixth application for disability insurance benefits alleging an onset date of 1955. All of these claims were denied by the Bureau of Disability Insurance (BDI).

Mr. Harapat filed the pending application, his seventh, on May 14, 1974, alleging an inability to work since September 2, 1950, because of back trouble, arthritis, diabetes and heart trouble. The claimant was denied initially and upon reconsideration on the basis that the matter had already been decided in a prior decision which became final and binding. Thereupon he requested a hearing before an Administrative Law Judge. On February 9, 1976, Morton J. Goustin, Federal Administrative Law Judge dismissed claimant's request for hearing on the grounds of *res judicata*. The claimant requested review of the dismissal on February 16., 1976. On April 12, 1976, the Appeals Council denied claimant's request for review on the basis that the dismissal was correct under the law and regulations. Thereafter, the claimant filed a civil action in the Federal District Court in the District of Minnesota for review of the said dismissal. On June 20, 1977, Judge Devitt entered an Order remanding the case for a hearing on the merits, as herein above set forth.

APPLICABLE LAW AND ISSUES

§ 223(d) (1) of the Social Security Act, as amended, defines

"disability" (except for certain cases of blindness) as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." § 223(d) (2) (A) further provides that "an individual (except a widow, surviving divorced wife, or widower for purposes of § 202(e) or (f) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind off substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers whether in the region where such individual lives or in several regions of the country."

The Eighth Circuit Court of Appeals originally established legal standards to be used in social security disability cases in *Celebrezze v. Bolas*, 316 F. 2d 498 (8th Cir. 1963) and recently reiterated those standards in *Klug v. Weinberger*, 514 F. 2d 423 (8th Cir. 1975). Those standards are:

> (a) the claimant has the burden of establishing his claim; (b) the Act is remedial and is to be construed liberally; (c) the Secretary's findings and the reasonable inferences drawn from them are conclusive if they are supported by substantial evidence; (d) substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (e) it must be based on the record as a whole; (f) the determination of the presence of substantial evidence is to be made on a case-to-case basis;

> (g) where the evidence is conflicting it is for the Appeals Council, on behalf of the Secretary, to resolve those conflicts; (h) the statutory definition of disability imposes a three-fold requirement (1) that there be a medically determinable physical or mental impairment which can be expected to (result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months, (2) that there be an inability to engage in any substantial gainful activity, and (3) that the inability be by reason of the impairment; (i) such substantial gainful activity is that which is both substantial and gainful and within the claimant's capabilities, realistically judged by his education, training and experience; (j) the emphasis is on the particular claimant's capabilities and on what is reasonably possible, not on what is conceivable; and (k) it is not the duty or the burden of the Secretary to find a specific employer and job for the claimant but, instead, some effort and some ingenuity within the range of the claimant's capacity remains for him to exercise.

§ 205(g) of the Act (42 USC 405(g)) states in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within 60 days after the mailing to him of notice of such decision or within such further time as the Secretary may allow . . . The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any Regulation pre-

scribed under subsection (a) hereof, the court shall review only the question of conformity with such regulation and the validity of such regulations.

§ 205(h) of the Act (42 USC 405(h)) states:

> The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 24 of the Judicial Code of the United States to recover any claim arising under this title.

Regulations § 404.937 (20 CFR § 404.937) provides in pertinent part:

> The presiding officer may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:
>
> (a) *Res judicata*. Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to same issue or issues which has become final either by judical affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing or review to such determination or decision. (See § § 404.911, 404.918, 404.946 and 404.951).

The general issue before the Administrative Law Judge is whether the claimant is entitled to a period of disability and disability insurance benefits under § § 216(i) and 223, respectively, of the Social Security Act, as amended. The specific

issues are whether the claimant was under a "disability" as defined in the Act, as amended, and if so, when such disability commenced, the duration thereof, and whether the special earnings requirements of the Act are met for the purpose of entitlement.

The issues are dependent as to whether at any time prior to March 31, 1953, which is the date the claimant last met the special earnings requirements, he was under a disability as defined in the Social Security Act, as amended.

EVIDENCE CONSIDERED

The Administrative Law Judge has carefully considered all the testimony given at the hearing, the arguments made, and the documents described in the List of Exhibits attached to this decision.

ANALYSIS OF THE CASE

I

As heretofore set forth, the Honorable Edward J. Devitt, United States District Judge vacated an Administrative Law Judge's dismissal and remanded the matter for a hearing on the merits. The previous Administrative Law Judge dismissed the said matter on the basis of administrative *res judicata.*

The legal basis for the previous Administrative Law Judge's dismissal is found in Regulations No. 4 § 404.937 (20 CFT 404.937)), a Regulation properly promulgated pursuant to § 205(a) of the Act (42 USC § 405(a)). § 404.937 provides that a matter can be dismissed when there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue of issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action.

It is well-established as a matter of principal that the doctine of administrative *res judicata* is applicable to some administrative proceedings. Such scholars as Kenneth Culp Davis have stated that the doctrine is at its best as applied in adjudication of past facts; he feels that it should be realized as applied to issues of law and policy involving continuing practices such as licensure. *K. Davis*, Administrative Law Treatise, § 1803 (1953). The doctrine of administrative *res judicata* is designed to prevent the relitigation by the same parties of the same facts and the same issues. In essence, it is in the interest of the parties, government and public in general to end relitigation of facts and issues previously adjudicated. The doctrine is especially important in Social Security matters in light of the multitudinous claims filed annually; the Supreme Court reported that more than 7,600,000 claims were filed in 1975. *Califano v. Sanders*, 97 S. Ct. 980 (1977). In the instant case, Mr. Harapat has filed seven applications for disability insurance benefits; he has had the benefit of a hearing in 1963, and numerous initial and reconsideration determinations subsequent to that hearing. Mr. Harapat's case is precisely the type of action which Professor Davis feels should be handled under the *res judicata* doctrine.

Notwithstanding the above, the crux of the matter, is whether a district court has subject matter jurisdiction to review *res judicata* dismissals. As previously set forth in the applicable law, § 205(g) and (h) provide that any individual, after any *final decision* of the Secretary made after a *hearing* to which he was a party, may obtain a review of such *decision* by a civil action filed in the District Court of the United States. It is well-established in the law that an application dismissed without a hearing on the ground of *res judicata* is not a final decision of the Secretary made after a hearing and cannot be reviewed in the courts. *Neighbors v. Secretary of Health, Education, and Welfare*, 511 F. 2d 80 (10th Cir. 1974); and *Easley v. Finch*, 431 F. 2d 1351

(4th Cir. 1970).

In a recent case, *Califano v. Sanders*, 97 S. Ct. 980 (1977), the Supreme Court had before it a fact pattern very similar to the one at bar. In that case, the plaintiff initially filed an application for disability insurance benefits on January 30, 1964, alleging inability to work because of epilepsy and blackout spells. His claim proceeded through the several steps of the administrative procedure. An Administrative Law Judge found that claimant was ineligible for benefits on the gound that he had not demonstrated a relevant disability of sufficient severity. The Appeals Council sustained this decision and the respondent did not pursue judicial review of the Secretary's final decision under § 205(g). Approximately seven years later, on March 5, 1973, respondent filed a second claim alleging the same bases for eligibility. His claim was again processed through administrative channels under the Secretary's Regulations. An Administrative Law Judge viewed the new application as barred by *res judicata* and denied reopening of the previous claim. The dismissal was affirmed by the Appeals Council. The plaintiff then filed for review in the United States District Court and alleged jurisdiction under § 205(g). The District Court dismissed the complaint in an unpublished memorandum opinion stating that it lacked jurisdiction to review the Administrative Law Judge's dismissal. The respondent then appealed to the United States Court of Appeals for the Seventh Circuit. In a split decision the Seventh Circuit acknowledged that there is no provision in the Social Security Act which would grant jurisdiction to review a dismissal of an Administrative Law Judge and refusal to reopen a prior denial for abuse of discretion. The court, however, held that the Administrative Procedure Act, § 10 contains an independent grant of subject matter jurisdiction. Thus, the Seventh Circuit concluded that the District Court has jurisdiction to review *res judicata* dismissals and refusals to reopen prior claims under § 10 of the APA.

From this decision, the United States Supreme Court reversed the Seventh Circuit and held that § 10 does not afford an implied grant of subject matter jurisdiction and that §205(g) only provides jurisdiction for review of "any final decision of the Secretary made after a hearing." Of further importance in this matter is that the Supreme Court cited *Neighbors v. Secretary of Health, Education, and Welfare*, 511 F. 2d 80 (10th Cir. 1974) in footnote 8. In *Neighbors* the Tenth Circuit dismissed a claimant's appeal on the ground that the Federal Courts lacked jurisdiction to review *res judicata* dismissals. The Tenth Circuit stated:

> The issues raised in the present appeal, that whether the District Court lacked jurisdiction to entertain a suit under the Act challenging the dismissal of an application for benefits on the ground that such application had been denied previously was before us in *Hobby v. Hoggis*, 215 F. 2d 54 (10th Cir. 1954). In *Hobby* we held that, where an applicant under the Act has filed a second application raising a claim for relief previously passed upon in an earlier application and where such subsequent application was dismissed without hearing on the ground of *res judicata*, there is no 'final decision of the Secretary made after hearing' and hence the court lacks jurisdiction to entertain a suit challenging such earlier decision. This result has been reached in other cases, and we think from the records such result is manifestly required here. it is clear that under the Act and Regulations promulgated thereunder, appellant had sixty (60) days from the . . . decision of the Secretary to seek judicial review of such decision. Appellant failed to do so, and the filing of a second and substantially identical application for disability benefits will not allow him to circumvent this requirement of the Act. (511 F. 2d at 81).

Notwithstanding the above the Administrative Law Judge has

abided by the remand Order of June 20, 1977, and held a hearing on the merits in St. Cloud, Minnesota, on September 27, 1977.

II

The claimant last met the special earnings requirements of the Act for disability purposes through March 31, 1953; therefore, any "disability" must have had its onset prior to that date. Any deterioration in the claimant's physical condition so as to reduce his potential to carry on substantial gainful employment after date date may not be substituted for his condition and working capacity prior thereto, even through his condition after the date on which the earnings requirements were last met may have reached that degree of severity as to constitute a "disability" under the Act. If this condition deteriorated after the date when the earnings requirements were last met, this fact cannot be considered of importance here.

Mr. Harapat testified at the hearing that he was born on January 19, 1919, and was 34 years of age when he last met the special earnings requirements of the Act. At the present time Mr. Harapat stands five feet seven inches and weighs approximately 168 pounds. He testified that he has weighed 168 pounds since the early 1950's. He was married in 1944 and has fathered eight children. At the present time only one child lives at home.

Mr. Harapat testified that he presently lives in Osakis, Minnesota, and drove to the hearing in St. Cloud, Minnestoa, a distance of approximately 54 miles.

The claimant related that he finished approximately seven grades in school and has no specialized or vocational skills. His occupational history reveals that he has worked as a painter, kitchen helper, assembler of air conditioners, operator of a power saw for a wood plant, and farmer.

Mr. Harapat testified that he has not worked at all since the

early 1950's. He alleged that he has been unable to mow the lawn and perform chores around the house since the early 1950's.

He complained of severe intractable pain in multiple joints, headaches, and nervousness. He related that subsequent to 1953 he began taking medication for diabetes and heart problems.

The claimant testified that he usually arises around 6:00 a.m. and goes to bed around 10:00 p.m. He drives his car up to 300 miles a month, has never gone fishing or hunting and has no hobbies. He does not go to any ball games, attend movies or attend church. He does, however, assist his wife with such housework as washing dishes, sweeping the floor and shopping.

Claimant's attorney, Orrin V. Rinki, posed numerous leading questions to his client which would establish that Mr. Harapat is indeed a rather inadequate individual who has complained of multiple pains and nervousness since the early 1950's.

Dorothy Harapat, the claimant's wife, testified that her husband's testimony was substantially correct. She did, however, relate that Mr. Harapat regularly attends high school basketball games in Osakis, Minnesota. She further stated that in the early 1950s his condition was much worse than at the present time. In fact, she stated that his hands were deformed in the 1950s by reason of severe arthritis. She further stated that at the present time he frequently gets up at night and drives his car around Lake Osakis for a couple of hours. She also testified that she and her husband socialize with friends approximately once a week.

Mrs. Harapat testified that her husband has been taking Indocin and blood pressure medication for 17 years (since approximately 1960 or 1961). Aside from those medications, her husband has only taken aspirin.

The administrative Law Judge arranged for a neutral vocational expert to be present and participate at the hearing.

Howard S. Feldman, Ed.D., from the Department of Vocational Rehabilitation at the University of Wisconsin-Stout in Menomonie, Wisconsin, testified as a neutral impartial vocational expert. Attorney Rinke stipulated to Dr. Feldman's qualifications.

The Administrative Law Judge posed two hypothetical questions to the vocational expert relating to the period of time from April 1, 1949 to March 31, 1953, which incorporated claimant's age, education, work experience and selected findings from the medical evidence of record. In response thereto, the neutral vocational expert opined that claimant possessed the residual functional capacity to perform such jobs as cementer or bench worker in the optical goods industry, wire worker in the electronics industry, heating element winder in the electric equipment industry, and ticketer in any industry. Dr. Feldman stated that the above-mentioned jobs were sedentary in nature; they would not require lifting over ten pounds maximum. Such jobs would involve mainly sitting but would allow for occasional walking and/or standing. He noted that the above fields of work are "typical of the 156 different job types classified under the sedentary category." He further noted that they require only a low level of general educational development and would require only 30 days of training for full production.

The undersigned Administrative Law Judge posed a third hypothetical question on behalf of attorney Mr. Rinke which included claimant's subjective complaints. In response to that hypothetical question Dr. Feldman concluded that claimant could not perform any work of a substantial gainful nature.

As previously mentioned, for claimant to be found entitled to disability insurance benefits, a "disability" sufficient to satisfy the Act, must be established either on or prior to March 31, 1953, and continue without interruption to at least May 14, 1973, 12 months prior to the date of the pending application. (See in this regard § 216(i) (2) (e)).

Attorney Rinke submitted to the Administrative Law Judge a report from Robert Peterson, M. D., a general practitioner, dating from January 31, 1949, to December 11, 1951. On January 31, 1949, Dr. Peterson reported that claimant was suffering from rheumatoid arthritis with pain in his joints and back. He estimated that claimant's disability was total and would prevent him from performing any occupation. On February 28, 1950, Dr. Peterson stated that claimant was unable to do any laboring work but could perform "any light work." On August 8, 1950, the physician stated "should try sedentary type work." He suggested that claimant undergo gold therapy because of stiff joints and spine. On March 7, 1951, Dr. Peterson advised claimant to avoid heavy laboring work. On December 11, 1951, Dr. Peterson recommended that claimant seek employment in another occupation. Again he felt that claimant was unable to do any laboring work.

On May 6, 1952, Mr. Harapat was examined at the Veterans Administration Hospital because of multiple pain. J. S. Abbott, M. D., a Medial Officer reported that motion in all joints of the upper extremeties was free and complete and without pain. On flexation of the dorsal lumbar spine claimant could reach to within four inches of the floor.

Claimant had a good lumbar curve and exhibited no muscle spasm. Claimant's straight leg raising and Patrick's test were normal. Claimant's leg reflexes likewise were normal. His motion in all joints in the lower extremities was free and complete without any pain. Dr. Abbott commented that the physical examination "shows practically nothing in the way of joint disturbance. There is no crepitus; no swelling; no abnormality of contour; no atrophy. The diagnosis is made on history alone."

In April 1959 claimant was again examined at the Veterans Administration Hospital. S. Zimberg, M. D. reported a normal lumbar curve, no paravertebral spasm and no tenderness.

Claimant's spinal motion was likewise normal. Straight leg raising and sciatic stretching tests were negative. Claimant's knee and ankle jerks were also normal. Dr. Zimberg reported no sensory deficit in either leg. The physician found no tenderness, swelling, atrophy, deformity or limitation of motion in any of claimant's joints. He rendered a diagnosis of arthritis by history alone. Claimant also underwent a psychiatric examination at the Veterans Administration Hospital. Charles A. Haberle, M. D. diagnosed anxiety reaction with psychophysiophysiological musculoskeletal reaction in a basically passive-dependent person. He felt that claimant was competent.

Claimant was examined at the Veterans Administration Hospital in 1964 and diagnosed as having a psychoneurotic reation, conversion reaction. For the first time, claimant was diagnosed as being a diabetic.

In May 1964 x-ray examination of claimant's lumbosacral spine was normal. A psychiatric examination by J. J. Lawton, M. D. revealed a conversion reaction, psychoneurosis, characterized by arthritic difficulties in a schizoid personality.

Claimant's personal physician Robert Peterson, M. D. reported in letters dated August 5, 1965, August 29, 1968, June 18, 1974, and January 14, 1975, the claimant has been totally disabled because of rheumatoid arthritis, low mentality, and general inadequacy. Dr. Peterson further stated:

> He's become so dependent on other people supporting him that there is never a possibility that he would get off the 'gravy train.' This, I do not believe is Mr. Harapat's fault, but I believe it is the fault of the Social Security and Welfare System that we abide by in this country.

Numerous other reports have been submitted to the Administrative Law Judge which clearly relate to claimant's condition after March 31, 1953. The Administrative Law Judge has considered these reports but feels that it is unnecessary to thor-

oughly summarize all such reports.

III

Of special significance to the instant case is the test regarding the three-fold requirement for a determination of disability: (1) a medically determinable physical or mental impairment which has or will last 12 months; (2) inability to engage in any substantial gainful activity; and, (3) the inability must be by reason of the impairment. *Yawitz v. Weinberger*, 498 F. 2d 956 (8th Cir. 1974). The Eighth Circuit added a fourth element of proof in *Timmerman v. Weinberger*, 510 F. 2d 439 (8th Cir. 1975). In that case the Court established that subjective evidence of pain testified to by the claimant and corroborated by family and neighbors must be considered.

As previously mentioned in this decision, claimant last met the special earnings requirements of the Act on March 31, 1953. Therefore, any "disability" must have had its onset either on or prior to that date. Hence, the Administrative Law Judge must examine claimant's condition as it existed 24 and one-half years ago.

The record before the Administrative Law Judge is anything but convincing. A report from the Veterans Administration Hospital dated May 1952 reveals *no objective evidence of any physical impairment*. In fact, Dr. Abbott reported no crepitus, no swelling, no abnormality of contour, and no atrophy. He further reported no muscle spasm, normal range of motion, normal straight leg raising and normal Patrick's test. Claiment's treating physician, a general practitioner reported on several occasions in 1950 and 1951 that claimant was unable to perform his usual occupation but could perform some other type of work. In 1965, 1968 and 1974 the general practitioner revised his conclusions from 1950 and 1951.

In essence, the medical evidence of record is not supportive of any significant pathology, dysfunction or anomaly at any

time in which the claimant was insured for disability purposes. In fact, in 1959, approximately six years after his insured status expired, a physicial examination at the Veterans Administration again failed to reveal any significant pathology.

The Administrative Law Judge recognizes that at the present time Mr. Harapat may be unable to engage in any work of substantial gainful nature by reason of his emotional and physical condition. However, his condition some 24 and one-half years after the date in which he last met the special earnings requirements of the Act cannot be substituted for his condition as it existed when he last met the earnings requirements.

Mr. Rinke, claimant's attorney contended at the hearing that claimant was psychiatrically disabled in 1953. The only medical report issued prior to March 31, 1953, which relates to claimant's psychiatric condition during the pertinent period is from Dr. Peterson, a general practitioner. On December 11, 1951, Dr. Peterson reported that claimant was not in need of any medical, surgical, *psychiatric* and/or nursing care. Again, the fact that in 1959 a diagnosis of psychophysiological reaction was rendered cannot be substituted for his condition and working capacity prior to March 31, 1953.

The trier of fact, in this instance, the Administrative Law Judge is charged with the duty and responsibility of developing a full and fair record and assigning probative weight to the evidence presented. It is for the undersigned to evaluate and weigh the witnesses' credibility.

The Administrative Law Judge is constrained to conclude that claimant's credibility is lacking. At the hearing, he testified that he does not socialize, attend ball games, or drive his automobile over 300 miles in one month. Mrs. Harapat testified under oath that she and her husband socialize with friends at least once a week, attend basketball games on a regular basis, and that Mr. Harapat regularly drives his automobile around Lake Osakis to relax and unwind.

Mrs. Harapat testified that her husband's hands and other joints were disfigured in the early 1950s by reason of arthritis. Her testimony is directly in contradiction with the medical reports from the Veterans Administration Hospital which relate that claimant did not experience any swelling, crepitus, deformity or atrophy in any joint.

Mr. Harapat seemed to have a solid recollection on points that would clearly benefit his case. When testifying on his daily activities work experience and et cetera, he was notably hesitant, sketchy and seemingly less truthful. Accordingly, the Administrative Law Judge must question Mr. and Mrs. Harapat's credibility.

The Administrative Law Judge is cognizant of Dr. Peterson's conclusions in 1965, 1968 and 1974 that claimant is totally "disabled." While Dr. Peterson's opinion is of evidentiary value, the function of deciding whether or not an individual is under a statutory "disability" is the responsibility of the Secretary. A statement by a physician that Mr. Harapat is or is not disabled is not determinative of the qeustion of whether or not Mr. Harapat is under a statutory "disability." As recognized by the medical profession, Dr. Peterson is competent to ascertain on the basis of objective medically determinable clinical and laboratory evidence, the nature, the limiting effect, and probable duration of claimant's impairments. It is not his function to decide the question of disability, since he is not expected to have knowledge of all the pertinent social security regulations and court cases. It cannot be assumed at least in the absence of evidence to the contrary that Dr. Peterson was familiar with the statutory meaning of the term "disability" or with the fact that it is a term of art which is to be distinguished from the term "impairment."

A claimant will not be found "disabled" and entitled to benefits merely because he is unable to perform his previous work. Viewing the evidence of record in a light most favorable to the

claimant, the undersigned concedes that claimant did not possess the residual functional capacity to work as a painter, kitchen helper, air conditioner assembler, and general laborer from the date of his alleged onset to March 31, 1953, the date in which he last met the earnings requirements of the Act. Accordingly, the burden shifts to the Secretary to prove that there is some other kind of substantial gainful employment which the claimant can perform. *Timmerman v. Weinberger*, 510 F. 2d 439 (8th Cir. 1975). The undersigned arranged for a neutral vocational expert to testify at the hearing. In response to two hypothetical questions based upon claimant's age, education, work experience and selected findings from the medical evidence, the vocational expert stated that claimant could perform a variety of sedentary type jobs during the pertinent period when claimant last met the earnings requirements for disability purposes. In response to a third hypothetical question based upon claimant's subjective complaints as well as his age, education and work experience, the vocational expert testified that claimant could not perform any work in the economy.

The Administrative Law Judge concurs with the vocational expert in his appraisal of claimant's vocational capacity based upon the two hypothetical questions which incorporated selected findings from the medical evidence of record. The undersigned is not unmindful of claimant's allegations of severe and intractable pain and headaches. However, the mere assertion of pain does not foreclose the trier of fact's conclusion based upon more persuasive evidence, that either the asserted pain does not exist or is of such a degree that it does not foreclose employment. *Pantekoek v. Weinberger*, No. 4-72-286 (D. Minn., filed July 2, 1975). The Administrative Law Judge is not obligated to accept claimant's assertions of pain at face value or to evaluate his assertions wholly apart from the medical and other evidence in the record. In light of the credible evidence of record the Administrative Law Judge cannot accept

the severity of claimant's allegations of pain. Claimant's testimony was clearly not credible and not persuasive. The medical evidence in this case is overwhelming that claimant was aflicted with only slight or insignificant impairments prior to March 31, 1953. Hence, the credible and persuasive evidence in the record does *not* provide a basis for severe and intractible pain which would prevent the claimant from performing the sedentary work as suggested by the neutral vocational expert.

Of significance in this case is the fact that Mr. Harapat chose to "retire" while in his early 30's. He has earned in his lifetime only $7,541.54. His lack of motivation and desire to be dependent upon others for support seems to be apparent. It is well-established in the work world that even the most healthy of individuals will remain unemployed without proper motivation. As stated in *Celebrezze v. Bolas, supra:*

> It is not the duty or burden of the Secretary to find a specific employer and job for the claimant but, instead, some effort and some ingenuity within the range of the claimant's capacity remains for him to exercise.

This claimant, who has not worked for over 25 years and who in fact decided to stop working at an extremely young age cannot be found entitled to disability insurance benefits. His condition as it existed prior to March 31, 1953, was not severe. Perhaps Dr. Peterson and vocational counselors who examined claimant in the 1960s are correct in their appraisal of the situation; that is, that claimant may be a product of our welfare system and as such cannot be blamed for his nonproductivity. In some instances, "getting something for nothing" can reduce a person's desire to work and make him totally dependent upon others. However, entitlement to disability insurance benefits cannot be hinged upon a condemnation of our welfare system or because an individual lacks proper motivation. The Act clearly establishes that Social Security disability is the "inability

to engage in any substantial gainful activity by reason of any *medically determinable physical or mental impairment* which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." (Underlining for emphasis only). There is *no doubt* in the undersigned Administrative Law Judge's mind that claimant is *not* entitled to any period of disability or to an award of disability insurance benefits under the Act, as amended.

FINDINGS

After careful consideration of the entire record, the following findings are made:

(1) That the claimant's stated date of birth is January 19, 1919, and he was 34 years of age when he last met the special earnings requirements of the Act;

(2) That the claimant has a seventh-grade education;

(3) That the claimant last met the special earnings requirements of the Act relative to disability on March 31, 1953;

(4) That the claimant alleged that he has been unable to work since April 1, 1949, because of nervousness, arthritis, and numerous somatic complaints;

(5) That the claimant's occupational history reveals that he has worked as a painter, kitchen helper, air conditioner assembler, and general laborer; that claimant in his lifetime earned only $7,541.54 in wages;

(6) That the claimant's credibility is clearly lacking in regard to his testimony pertaining to his daily activities and impairments;

(7) That Mrs. Harapat's credibility is clearly lacking in regard to her statements pertaining to her husband's

impairments;

(8) That the record does not establish severe and intractable pain which, in itself, would have precluded claimant from engaging in work activity prior to or on March 31, 1953;

(9) That the medical evidence establishes no severe or othopedic dysfunction, no neurological deficit and no related physical or mental impairment on or prior to March 31, 1953, which would preclude claimant from engaging in the type of work activity suggested by the neutral vocational expert;

(10) That despite claimant's alleged dysfunctions, he retained a number of residual transferrable skills from previous work experience as mentioned by the neutral expert;

(11) That the claimant's possessed the overall physical and mental capacity to perform a variety of occupations within the national and local economy at all times pertinent to this case and as representative thereof are occupations suggested by the neutral vocational expert who testified in this case;

(12) That the jobs and fields of work mentioned by the neutral vocational expert are merely illustrative of the many types of work of which claimant was capable of performing and they are not all inclusive;

(13) The claimant was not prevented from engaging in substantial gainful activity, on or before March 31, 1953, the date the special earnings requirements were last met, for any continuous period of at least 12 months;

(14) The claimant was not under a "disability," as defined in the Social Security Act, as amended, at any time on

or before March 31, 1953. .

In arriving at the above conclusions, the undersigned has given due consideration to the claimant's age, education, training, work experience and adaptability and to all the evidence of record in addition to the pertinent regulations. See Social Security Administration Regulations No. 4, 20 C. F. R., § 404.1502.

RECOMMENDED DECISION

It is the recommended decision of the undersigned Administrative Law Judge that the claimant based on his application filed on May 14, 1974, is not entitled to the disability insurance benefits for which he has applied.

Specific notice is hereby given to claimant that this decision is preliminary only, subject to final action by the Appeals Council, adopting, confirming, modifying or rejecting it. The claimant has the opportunity to file with the Appeals Council within ten days of the date of this recommended decision, briefs or other written statements of exception and comment, as to the applicable facts and law. After the ten day period has expired, the Appeals Council reviews the record and issues its decision.

/s/ Everett J. Hammarstrom
Administrative Law Judge
Suite 830, Plymouth Building
12 South Sixth Street
Minneapolis, Minnesota 55402

Date: Dec. 23, 1977

(Title of Cause)

ORDER

I approve the recommendation of the United States Magistrate and direct that the case be returned to the Secretary of Health, Education and Welfare for a hearing to be held on the petitioner's petition within ninety (90) days from the date hereof.

DATED: June 20, 1977.

/s/ Edward J. Devitt, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Sixth Division

Stanley Harapat,
Plaintiff,
vs.
Caspar Weinberger, Secretary of Health, Education & Welfare,
Defendant.

Civil 6-76-199

Rinke, Noonan, Grote & Smoley by William A. Smoley, 100 South Second Avenue, Sauk Rapids, Minnesota attorneys for plaintiff.

Thorwald H. Anderson, United States Attorney, and Elizabeth A. Egan, Assistant United States Attorney, 596 United States Courthouse, Minneapolis, Minnesota attorneys for defendant.

Plaintiff seeks judicial review under 42 U. S. C. 405(g) of an order by the Hearing Examiner for the Department of Health, Education and Welfare which denied Social Security disability insurance benefits requested under 42 U. S. C. 416(i) and 423.

The scope of judicial review is limited by 42 U. S. C. 405(g)(h) to whether substantial evidence exists in the record to support the Secretary's findings. *Easttam v. Secretary of Health, Education & Welfare*, 364 F. 2d 509 (8th Cir. 1966); *Gendreau v. Finch*, 298 F. Supp. 546 (D. Minn. 1968).

The Appellate Court of the Eighth Circuit has set out legal standards to be used in this type of case. *Celebrezze v. Bolas*, 316 F. 2d 498, 500-501 (8th Cir. 1963); *Garrett v. Richardson*, 471 F. 2d 598, 599-600 (8th Cir. 1972); *Yawitz v. Weinberger*, 498 F. 2d 956 (8th Cir. 1974); *Klug v. Weinberger*, 514 F. 2d 423 (8th Cir. 1975). Those standards are:

(a) the claimant has the burden of establishing his claim; (b) THE ACT IS REMEDIAL AND IS TO BE CONSTRUED LIBERALLY (emphasis supplied); (c) The Secretary's findings and the reasonable inferences drawn from them are conclusive if they are supported by substantial evidence; (d) substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conslusion; (e) it must be based on the record as a whole; (f) the determination of the presence of substantial evidence is to be made on a case-to-case basis; (g) where the evidence is conflicting it is for the Appeals Council on behalf of the Secretary to resolve those conflicts; (h) the statutory definition of disability imposes a three-fold requirement (1) that there be a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. (2) that there be an inability to engage in any substantial gainful activity, and (3) that the inability be by reason of the impairment (i) such substantial gainful activity is that which is both substantial and gainful and within the claimant's capability, realistically judged by his education, training, and experience; (j) THE EMPHASIS IS ON THE PARTICULAR CLAIMANT'S CAPABILITIES AND ON WHAT IS REASONABLY POSSIBLE, NOT ON WHAT IS CONCEIVABLE, (emphasis supplied); and (k) it is not the duty or the burden of the Secretary to find a specific employer and job for the claimant but, instead, some effort and some ingenuity within the range of the claimant's capacity remains for him to exercise.

This appeal is from a hearing in which there was an adverse ruling on September 9, 1975, by the Bureau of Disability Insurance, Social Security Administration, United States Department of Health, Education and Welfare, denying this petitioner's

seventh application filed herein on May 14, 1974, to establish a period of disability and for an award of disability insurance benefits. The ruling of the Administrative Law Judge, and supported by the Appeals Council of the Department of Health, Education and Welfare, was that the petition of Stanley Harapat had previously been determined and that determination was binding on the parties, and the defense of res judicata prevailed.

The petitioner has asked for a review by the United States District Court to which he is entitled as is stated in paragraphs one, two, and three of this opinion. It is the duty of the Secretary to provide the court with a transcript of the proceedings which are pertinent to the appeal. The transcript furnished the court in the first instance herein was illegible in most instances and obviously incomplete. The court informed the United States Attorney of this defect and some months later a more legible but still incomplete record was furnished to the court. By incomplete record I refer to index of the exhibits of the original hearing which was concluded by a decision of Thomas E. Wiley, Hearing Examiner, for the Department of Health, Education and Welfare on September 30, 1963. The index indicates that exhibits 10, 11A, 11B and 11C were medical reports from a doctor who had attended the petitioner and the medical report are not in the record. In review, it is impossible for the court to determine what the doctor had to say concerning the disability of the petitioner. Since that petition, this petitioner has filed six more petitions, and there is no indication of any outcome of the previous petitions other than a conclusion that res judicata disposed of them.

In this matter the only thing the court has to go on is the testimony of the petitioner himself together with the testimony, and I mean testimony, of the Hearing Examiner. The sum and substance of the petitioner's complaint if that he had not worked since 1950. He has been on various welfare and assistance plans since then. He was discharged from the military

service honorably with a notation of CDD which petitioner testified "can't do duty." The petitioner claims that he was disabled then and was disabled in 1963 and is to and including the date of the application for benefits by way of this petition.

In reviewing the report of proceedings held before Thomas E. Wiley, Hearing Examiner, on the 25th of June 1963 at St. Cloud, Minnesota, it can hardly be said that the petitioner had a hearing at that time as the law implies. The general tenor and attitude of the Hearing Examiner was that he was the defense attorney and that he was the medical authority for the Department. On page 12 of the 1963 hearing an example is as follows:

Q "Now, this question pertains to limitation of motion, which is very important in arthritic people. Sometimes he can't raise his arms, sometimes he can't straighten a leg, sometimes he can't straighten up, sometimes the wrist will be all swollen up and you can't move your wrist, that is limitation of motion. Do you have limitation of motion in the joints?

A "I would say yes."

Q "Which joints?"

A "Well, its the legs sometimes, sometimes the back, sometimes the neck."

Q "You have it, and then it goes away."

A "That's right."

Q "Did you ever, for any period of time, have a joint you couldn't move, say for as much as a month?"

A "No, not as much as a month, maybe a day or two, or something like that?"

On page 16 of the transcript is the following testimony.

Q "Has your memory been affected by your nervous condition?"

A "Well, I can't remember anything too well, things."

Q "Could you tell us something that you didn't remember that you know you should have remembered, do you forget where you put things?"

A "Could be no, yes." * * *

Q "Did you ever have any trouble with fears, do you fear this or do you fear that?"

A "Yes." (testimony continuing on page 17 of tr.)

Q "Do you think much more so than any one else?"

A "I wouldn't say any more."

Q "There haven't been any of those fears that have ever been important (unintelligible) do you feel that they are important?"

A "No."

Q "You have seen people who have had poliç and had a bum leg that they can't use, that is parapysis, you have had no paralysis?"

A "No."

Continuing the testimony on page 18 of the transcript

Q " * * * what is there about your condition that you think we should know? What is there about your nervous condition that keeps you so you can't work?"

A "My memory."

Q "It is not enough to say I'm nervous. You have to say

what the main specifications of the nervousness are, how it affects you, how it affects other people. Do you get cranky, short tempered?"

A "Yes."

Q "Everybody does, don't they?"

A "I suppose, I imagine." (testimony continued page 19)

Q "Do you get more that way than you used to?"

A "Yes, a lot of times I guess."

Q "Well, if Uncle Sam were to ask you today, and he does ask you, why you can't work, how would you answer?"

A "I can't work because of, on account of my arthritis in the back and the nervous condition."

Q "We understand about the arthritis, we are not quite sure about this nervous condition. Now, you say that it affects your memory, it affects you so you are a little short tempered, what else did you say?"

A "Get headaches."

Q "You never been treated for it?"

A "For what."

Q "For nervousness?"

A "For headaches."

Q "I mean you have never been hospitalized for nervousness?"

A "No, I never been."

Q "You have no paralysis, you have no blackouts, you did have blackouts, that doesn't add up very much about the

nervous condition. What else is there you have about the nervous condition that keeps you, perhaps keep you from working. Can you mention anything further for the record, well?"

A "I don't know what to put down there."

Continuing the testimony on page 23 of the transcript.

Q "You have no tenderness, swelling, atrophy, deformity of of limitation of motion, but you have arthritis. Well, is there anything else that you think we should know about your case that we haven't touched on?"

A "Not that I know of, we just about went through it now."

Q "There is some question in my mind about your nervous condition?"

MRS. HARAPAT: "Can I answer that?"

EXAMINER: "Just a second. This veteran says that he has been nervous in the last couple of years, he's developed headaches, besides aches in the joints, the trouble with his stomach which is described, as pains, gas pains. He does not seem particularly anxious as he talks about this, however, he is not too verbal, that means he don't say too much or describe his feelings, he's only able to sleep about four hours a day, is that right, he has a good appetite, shows no fear, but the old stuff like that gets you down?"

Q "Did you say that there is something you could tell us that would be helpful, Mrs. Harapat?"

MRS. HARAPAT: "You were talking about his nervous condition, I don't know anyone who sweats like Stanley do."

Q "Do you sweat quite a bit?"

CLAIMANT: "Yes."

MRS. HARAPAT: "He can't work any length of time, he gets all worn out, he just wants to sit down."

Q "Now he sweats a great deal and he gets tired easily, is there anything else that you feel the record ought to show?"

A " * * * He would work a few days, then he would be sick a few days, then pretty soon that got around and he wasn't able to get any work."

The question now is whether the doctrine of res judicata bars consideration of Harapat's application for disability insurance benefits. Harapat filed an initial application for benefits that brought about the meeting on July 25, 1963, just reviewed. He did not file appeals as the law provides although undoubtedly he was advised of that right or obligation.

Regulation 20 C. F. R. 404.937(a) reads:

> "The Administrative Law Judge may, on his own motion dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:
> (a) *Res judicata*. Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or to commence a civil action with respect to such determination or decision. * * *

The Administrative Law Judge has denied the rehearing claiming that the applicant has not made a showing of "good cause."

Regulation 20 C. F. R. 404.957 provides:

> "An initial, revised, or reconsidered determination of the Administration or a decision or revised decision of a hearing examiner or of the Appeals Council which is otherwise final * * * may be reopened * * * to the party to such determination * * *"

Although application of the doctrine of res judicata to administrative decision serves a useful purpose in preventing relitigation, it is not applied with the same rigidity as its judicial counterpart. *United States v. Smith*, 482 F. 2d 1120, 1123 (8th Cir. 1973). *Grose v. Cohen*, 406 F. 2d 823, 825 (4th Cir. 1969), recognized that "practical reasons may exist for refusing to apply it." The existence of the reopening regulation indicates that it is undesirable to attribute finality to every administrative decision. 20 C. F. R. 404.957.

Furthermore, it is immaterial that Harapat's second application was framed as a new application rather than a petition to reopen. In *Leviner v. Richardson*, 443 F. 2d at 1342; *Brinker v. Weinberger*, 75-1130 (8th Cir., September 3, 1975), the court emphasized that the reopening regulation

> also serves to identify decisions that should not be interposed to deny subsequent applications. A decision that is subject to being reopened provides an inappropriate bar.

The dictates of equity and fundamental fairness that allow a a decision to be reopened preclude use of the same decision as a foundation for res judicata. See *Grose v. Cohen*, 406 F. 2d at 825 (4th Cir. 1969).

As noted above there is a question whether this claimant ever had a hearing. The record does not disclose an impartial, fair hearing. The record does not disclose the medical evidence presented by this petitioner with an eighth grade education.

This case should be returned to the Administrative Law Judge for a hearing on its merits. The petitioner now has an attorney who will help him present his case. The file indicates the petitioner has tried to inform the court that he has additional medical evidence.

I recommend to the court that this case be returned immediately to the Secretary for a hearing. It is further recommended, because this matter has been strung on for some fourteen years, that the Secretary be directed to conduct this hearing within ninety (90) days of the date of this order and that the Administrative Law Judge hear the same, decide the case promptly as well as fairly.

DATED: June 20th, 1977.

/s/ George G. McPartlin
United States Magistrate

42 U. S. C. § 405(g)

(g) Judicial review

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision,

or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

20 C. F. R. § 404.957

§ 404.957 Reopening initial, revised, or reconsidered determinations of the Administration and decisions or revised decisions of an Adminstrative Law Judge or the Appeals Council; finality or determination and decisions.

An initial, revised, or reconsidered determination of the Administration or a decision or revised decision of an Administrative Law Judge or of the Appeals Council which is otherwise final under § 404.908, § 404.916, § 404.940, or § 404.951 may be reopened:

(a) Within 12 months from the date of the notice of the initial determination (see § 404.907), to the party to such determination, or

(b) After such 12-month period, but within 4 years after the date of the notice of the intital determination (see § 404.907) to the party to such determination, upon a finding of good cause for reopening such determination or decision, or

(c) At any time when:

(1) Such initial, revised, or reconsidered determination or decision or revised decision was procured by fraud or similar fault of the claimant or some other person; or

(2) An adverse claim has been filed against the same earnings account; or

(3) An individual previously determined to be dead, and on whose account entitlement of a party was established, is later found to be alive; or

(4) The death of the individual on whose account a party's claim was denied for lack of proof of death is established by reason of his unexplained absence from his residence for a period of 7 years (see § 404.705); or

(5) The initial, revised, or reconsidered determination or decision or revised decision (for purposes of entitlement under title II or Part A and Part B of title XVIII, or for purposes of

the amount of benefits under title II) either;

(i) Denies the individual on whose earnings account such benefit claim is based gratuitous wage credits for World War II or post-World Warr II military or naval service because another Federal Government agency (other than the Veterans' Administration) has erroneously certified that it has awarded benefits based on such service; or

(ii) Credits the earnings account of the individual on which such benefit claim is based with such gratuitous wage credits and another agency of the Federal Government (other than the Veterans' Administration) thereafter certifies that it has awarded a benefit based on the period of service for which such wage credits were granted.

(7) Such initial, revised, or reconsidered determination or decision or revised decision was that the claimant did not have the necessary quarters of coverage for an insured status but thereafter earnings were credited to his account pursuant to section 205(c)(5) (C), (D), or (G) of the Act, which would have given him an insured status at the time of such determination or decision if such earnings had been credited to his account then.

(8) Such initial, revised, or reconsidered determination or decision or revised decision is unfavorable, in whole or in part, to the party thereto but only for the purpose of correcting clerical error or error on the face of the evidence on which such determination or decision was based.

(9) Such initial, revised, or reconsidered determination or decision or revised decision is that a claimant is entitled to monthly benefits or to a lumpsum death payment based on the earnings of a deceased individual and thereafter it is established that such claimant was finally convicted by a court of competent jurisdiction of the felonious and intentional homicide of such deceased individual.

20 C. F. R. 404.958

§ 404.958 Good cause for reopening a determination or decision.

"Good cause" shall be deemed to exist where:

(a) New and material evidence is furnished after notice to the party to the initial determination:

(b) A clerical error has been made in the computation or recomputation of benefits;

(c) There is an error as to such determination or decision on the face of the evidence on which such determination or decision is based.

No. 79-436

In the Supreme Court of the United States

OCTOBER TERM, 1979

STANLEY HARAPAT, PETITIONER

v.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-436

STANLEY HARAPAT, PETITIONER

v.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that the district court lacked jurisdiction to review the denial of his seventh application for Social Security disability benefits on the ground of administrative *res judicata*. For the reasons fully explained by the court of appeals (Pet. App. A-1 to A-6), that decision is correct.

1. Petitioner was last employed in the early 1950's (Pet. 3) and last met the earnings requirement under the Social Security Act, 42 U.S.C. 401 *et seq.*, on March 31, 1953 (Pet. App. A-1). Thus, petitioner's claim involves his physical and mental condition more than 25 years ago. Petitioner's first application for disability benefits was filed in 1962 (Pet. App. A-1). It was denied initially, on reconsideration, and after a hearing by an administrative

law judge in 1963 (*ibid.*). Petitioner did not appeal to the Appeals Council or seek judicial review. Instead, he filed five more applications for the same period of disability over the next nine years (*ibid.*). Each was denied; in none did petitioner exhaust his administrative remedies or seek judicial review (Pet. 3).

Petitioner, with the assistance of counsel, filed his seventh application for benefits in 1974 (Pet. 3-4). This claim was denied initially and on reconsideration, and a hearing was denied on the ground that it was barred by a prior final decision of the Secretary under the principle of administrative *res judicata*. 20 C.F.R. 404.937(a). The Appeals Council affirmed (Pet. 4). Petitioner then sought judicial review pursuant to Section 205(g) of the Act, 42 U.S.C. 405(g). Based on a magistrate's recommendation, the district court rejected the government's claim of *res judicata* and remanded to the Secretary for a hearing on the merits of petitioner's application (Pet. A-43 to A-53).

On remand, the administrative law judge conducted a hearing and issued a recommended decision, concluding that petitioner was not disabled at the pertinent time. The judge added that he still considered petitioner's claim to be barred by *res judicata* (Pet. A-21 to A-42). The Appeals Council affirmed (*id.* at A-18 to A-20) and petitioner again sought judicial review. Based on a magistrate's recommendation, the district court entered judgment for petitioner on the ground that the Secretary's decision was not supported by substantial evidence (*id.* at A-10 to A-17).

The Secretary appealed, contending that the administrative decision was supported by substantial evidence. The Secretary also claimed that the district court had erred in initially accepting jurisdiction over the case because the original administrative denial of

petitioner's seventh application for benefits was not a "final decision of the Secretary made after a hearing" and was thus not subject to judicial review under 42 U.S.C. 405(g) and (h).[1] The court of appeals agreed, holding that the Secretary's denial of petitioner's application without a hearing on the basis of *res judicata* (see 20 C.F.R. 404.937) and the Secretary's refusal to reopen petitioner's first application (see 20 C.F.R. 404.957) are not subject to judicial review in light of *Califano* v. *Sanders*, 430 U.S. 99 (1977).

2. The court of appeals correctly held that *Califano* v. *Sanders, supra*, forecloses judicial review of petitioner's claim. In that case, the Court held that 42 U.S.C. 405(g) does not confer jurisdiction on the district courts to review a final decision of the Secretary not to reopen a previously adjudicated claim for benefits, because it is not a decision made after a hearing. 430 U.S. at 107-108. The principle established there is equally applicable to the Secretary's initial refusal to grant a hearing on petitioner's seventh application for benefits based on *res judicata* under 20 C.F.R. 404.937(a). This was not a decision made after a hearing, and Congress has thus precluded judicial review.

The Tenth Circuit has also held that dismissal of claims by the Secretary on *res judicata* grounds are not reviewable under 42 U.S.C. 405(g) and (h). *Neighbors* v. *Secretary of Health, Education and Welfare*, 511 F. 2d 80

---

[1] Although the Secretary did not appeal the district court's initial remand order, the court of appeals correctly held (Pet. App. A-6) that she was free to raise the jurisdictional issue after the district court's decision on the merits following the remand, since jurisdictional issues may be raised at any time. See Fed. R. Civ. P. 12(h)(3). Petitioner does not dispute this holding.

(10th Cir. 1974), cited with approval in *Califano* v. *Sanders*, *supra*, 430 U.S. at 107-108 n.8. Petitioner does not discuss *Sanders* or *Neighbors*, and, indeed, cites no authority in support of his contention (see Pet. 4-5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979

DOJ-1979-11